IN THE WASHINGTON COURT OF APPEALS
Division Two

In Re the Personal Restraint of: James Lee Walters, Petitioner, Pro Se.	No. 46370-9-II Mr. Walters' Reply to the Response Filed By the Indeterminate Sentence Review Board

I. Identity of Petitioner

Mr. Walters, Petitioner Pro Se, with the assistance of another offender, files this Reply to the Response filed by the Indeterminate Sentence Review Board. Mr. Walters is currently under confinement at the Stafford Creek Corrections Center, and is under the Board's jurisdiction pursuant a conviction for Indecent Liberties and Kidnapping with Sexual Motivation.

II. Introduction

In response to Mr. Walters' petition, the Indeterminate Sentence Review Board (Board) makes essentially three arguments. First, the Board claims that it was proper to rely on allegations which resulted in an acquittal to support their

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finding that Mr. Walters is not eligible for parole under RCW 9.95.420, highlighting that the standard of proof during a board hearing is lower than that required to convict. Next, they claim that they did not err in finding Mr. Walters ineligible for parole based on a lack of Sex Offender Treatment, because in their opinion "Walters could have been found amenable to treatment [in 2012] despite his appeal if he had simply acknowledged having committed a sex offense at some point in his life... ." Finally, the Board states that the hearing panel was neutral and detached, despite "one of the Board members stating on the record during [Mr. Walters'] releasability hearing that she *would not* consider releasing him before he went through sex offender treatment." [Italics mine]

The Boards arguments fail scrutiny.

III. Argument

a) It was error for the Board to consider evidence of a twenty-plus-year old allegation that resulted in an acquittal.

Relying on *Alabama v. Shelton*, 535 U.S. 654, 665, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) and *In re Haynes*, 100 Wn.2d 366, 996 P.2d 637 (2000) the Board reasons that it "may consider evidence of uncharged crimes, *or evidence of crimes of which an offender was acquitted*, declaring any *fact* or consideration demonstrating that an inmate is not a fit subject for release is sufficient for a finding of non-parolability.

That stance is problematic for several reasons. First, the holding of the U.S. Supreme Court in *Alabama v. Shelton*, held only that once guilt has been established, a *sentencing court* may take into account not only a defendant's prior convictions, but also past criminal behavior. This narrow rule did not open the

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door to allow a criminal court, or the Board for that matter, to consider conduct resulting in an acquittal during sentencing or any other proceeding.

Secondly, *In re Haynes*, lends nothing to the Board's position. The accusation Mr. Walters was acquitted of hardly amounts to a fact that is worthy of consideration in a finding of non-parolability. The Board only had a couple preliminary police reports and a victim statement. They did not have any of the court records, the trial transcripts, or any of the evidence considered by the jury that *acquitted* Mr. Walters over twenty-years ago. This one sided account of a decades old allegation is not a reliable source of information by which to deny parole.

Next, the Board claims that WAC 381-90-140 controls a parolability hearing, rather, than the more specific WAC 381-60-150. While Mr. Walters maintains his position that WAC 381-60-150 controls; the limited subjective evidence surrounding this decades old acquittal would surely not be *relevant information* under WAC 381-90-140.

The term *relevant* is defined by Webster's Dictionary as "having significant and demonstrable bearing on the matter at hand; affording evidence tending to prove or disprove the matter at issue or under discussion... ."

Again, the only information the Board was able to obtain was a couple police reports and a victim statement, all of which was one-sided. There was no trial transcript, no exhibits, no court records, or anything else for the Board to determine the veracity of the allegations made. We do, however, know there was something else, some piece of evidence significant enough for an impartial jury, a

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trier of fact, to enter a verdict acquitting Mr. Walters of any wrongdoing. The Board, however, was not interested in this fact.

Ultimately, the Board's argument lacks respect for the judicial system and is a complete affront to the jury's verdict; a verdict rendered by those who were privy to *all the evidence* available in 1983.

Finally, in a last ditch effort to mitigate the Board's reliance on these unsupported allegations, the Board claims they did not even mention the 1983 acquittal in making its decision; rather, they only relied upon the elevated leveling decision by the End of Sentence Review Board, and it was *that decision which was based upon the 1983 acquittal.*

Thus, by the Board's own admission they considered the 1983 acquittal in deciding to deny parole. Moreover, a brief review of the Board's decision contradicts their current assertion. Therein the Board found that Mr. Walters was more likely than not to engage in sex offenses if released on conditions, citing the conclusion of the End of Sentence Review Board as a reason to deny parole, that being: *the past intervention did not preclude his current offense.* See Decision at Page 4, attached to Initial Petition at Appendix C

The Boards reliance on acquitted conduct was an abuse of discretion.

b) The Board's condition that Mr. Walters participate in Sex Offender Treatment prior to becoming parolable was an abuse of discretion.

The Board makes an entirely speculative argument asserting that Mr. Walters was not precluded from entering treatment due to his impending appeal, claiming that *he was free to admit to the 1983 accusation or another sex offense.* While this argument may sound good on its face, it is supported by nothing more

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than unadulterated conjecture in direct opposition to the 1983 acquittal. Mr. Walters is only able to truthfully admit to conduct he is guilty of, to suggest otherwise is irrational. In short, Mr. Walters would have to lie in order to do as the Board suggests in their current argument.

The Board, however, reasons:

> It was ultimately his choice to not only deny the current offense, but to also deny committed [sic] any prior offense. For example, he could have admitted to the 1983 rape without negative consequences, given that double jeopardy prevents him from being retried on that crime, and given that the facts of those charges are already used by law enforcement for purposes of his registration requirement, his civil commitment potential, and his sex offender level.
>
> ...
>
> He had no good reason to deny he has committed any sex offense at all. If he truly wanted to do sex offender treatment in 2012, he could have made the decision to do so.

This argument is simply preposterous and in all reality bolsters Mr. Walters' argument that the Board improperly relied upon the 1983 acquittal in their decision; just as they are relying on their unsupported assumption he was guilty of not only the 1983 accusation, but also other unidentified sex offenses in their current argument.

It is irrefutable that Mr. Walters was acquitted of the 1983 allegations and the Board has no evidence to the contrary. Yet, they continue to act as if he is guilty for those acts and should have admitted to them in order to become amenable for treatment prior to his board hearing.

The Board is correct on one point. Mr. Walters was recently accepted for Sex Offender Treatment. Upon completion of his appeal process, including post-conviction proceedings, Mr. Walters admitted his current offense, applied for, and was accepted into treatment. He is currently awaiting transfer.

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That fact, however, does nothing to mitigate the fact that the Board denied him the opportunity for parole because they felt he was guilty of a crime he was acquitted of, and had not become amenable for treatment due to exercising his constitutionally protected right to an appeal.

Also, the Board's reliance on *In re Dyer*, 175 Wn.2d 186 is misplaced. While the court in *Dyer* indeed held that "it was not improper for the Board to deny parole *partly* based on the fact that the offender's denial of guilt made him ineligible for the sex offender treatment program," that holding is easily distinguishable from Mr. Walters' case. First, *Dyer's* judgment was not under appeal during his parolability hearing; he was convicted of several violent rapes against multiple victims; and falls under an entirely different statutory scheme. *Dyer* is a pre-SRA offender who regularly participates in .100 hearings where the burden is on him to demonstrate parolability with no expectation of parole.

Mr. Walters, however, falls under the .420 hearing, where the burden is on the Board and there *is* an expectation of release. Thus, the Supreme Court's holding in *Dyer* is inapplicable. We are talking about an entirely different statutory scheme, hearing procedure, and burden of proof.

If the Board's argument carried any weight, the Board could literally find all sex offenders finding themselves in a position where they are not amenable for treatment unparolable, whether due to appeal, an erroneous verdict, or a multitude other reasons.

That would of course go directly against the Supreme Court's holding in *In Re Pers. Restraint of Ecklund*, 139 Wash.2d 166, 985 P.2d 342 (1999) where it was held, we do not believe it would have been appropriate for the Board to base

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an exceptional sentence minimum term *solely* on *Ecklund's* refusal to admit that he was guilty of the offense which led to his sentence to prison.

As previously pointed out, the decision in *Ecklund,* and *Dyer*, followed hearings under RCW 9.95.100, which prohibited the Board from releasing an offender *until his or her minimum term expires, unless in its opinion his or her rehabilitation has been completed.* The same standard does not apply here. Under RCW 9.95.420 the Board is *required* to order an offender released unless it finds by a *preponderance* of the evidence that the offender is *more likely than not* to engage in sex offenses if released on conditions.

This standard was not followed, and suggesting that Mr. Walters could have admitted to a crime he did not commit does nothing to alleviate the Board's abuse of discretion in this matter.

c) Mr. Walters was not afforded a neutral and detached hearing panel during his 2012 hearing.

The Board responds to this issue by claiming that one of the members of Mr. Walters' hearing panel stating, on the record, that she would *not even consider releasing him without treatment,* is insufficient to demonstrate that he did not receive a hearing by a neutral and detached party.

By definition, a neutral and detached hearing body ought to encompass panel members who are not predisposed to deny parole regardless of the circumstances, *unless* the parolee forgoes their appeal, admits to the offense, and seeks treatment.

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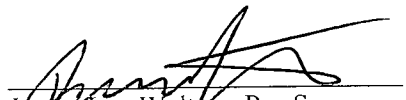
One of the hearing officials present at Mr. Walters' hearing made it abundantly clear, on the record, she "*would not even consider releasing him without treatment.*"

Mr. Walters' hearing was not conducted by a neutral and detached panel, although one was required. See *In re McCarthy*, 161 Wash.2d 234, 241 (2007).

IV. Conclusion

Mr. Walters respectfully requests that this Court grant his petition and the relief requested.

Respectfully Submitted this 4 day of November, 2014.



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CERTIFICATE OF SERVICE

I, James Lee Waters, certify that on the date below I caused a true and correct copy of the above to be served upon Respondent addressed as follows, via the United States Postal Service, postage prepaid:

Ronda D. Larson, WSBA# 31833
Assistant Attorney General
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Olympia, WA 98504-0116

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 4 day of November, 2014.

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